

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TRACEY LAMONT ORTIZ,

Defendant-Appellant.

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UNPUBLISHED

April 26, 2007

No. 269032

Oakland Circuit Court

LC Nos. 2005-204147-FC;

2005-204200-FC

Before: Cavanagh, P.J., and Jansen and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of two counts of armed robbery, MCL 750.529.<sup>1</sup> We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's convictions arose from three robberies that occurred within a few blocks of each other within five days. Two victims identified defendant as the robber. The third victim stated that he could not see the face of the person who robbed him, but that defendant was the approximate height, weight, and build of the robber. An investigating officer testified that defendant confessed to the three robberies.

Defendant's sole claim on appeal is that his trial counsel rendered ineffective assistance by failing to move to sever the trial for what he maintains were unrelated criminal offenses. Prior to trial, the prosecutor and defense counsel informed the trial court that they had agreed to proceed with one jury hearing all three charges simultaneously. Defense counsel stated that he initially considered requesting separate trials, but that he and defendant had discussed the matter and had concluded that only one trial should be conducted. Counsel stated that defendant would confirm that that was his desire, and defendant did so. The trial court had no objection to consolidating the trials.

Because the trials were joined at counsel's joint request with the prosecutor, and because defendant specifically agreed to have the charges heard in one trial, defendant has waived

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<sup>1</sup> Defendant was charged with three counts of armed robbery, but the jury could not reach a verdict on the third charge. The prosecutor subsequently dismissed this charge.

consideration of this issue on appeal. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). However, because defendant maintains that this decision was based on improper advice from counsel, we review defendant's ineffective assistance claim.

Defendant failed to preserve this issue because he did not move for a new trial or evidentiary hearing below. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Review of an unpreserved claim of ineffective assistance of counsel is limited to error apparent on the record. *Id.* at 659.

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To establish ineffective assistance of counsel, "a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). To establish prejudice, a defendant must "demonstrate a reasonable probability that, but for counsel's error, the result of the proceedings would have been different . . . ." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001); see also *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). In addition, a defendant must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances. *Toma*, *supra* at 302.

Two or more informations against a single defendant may be consolidated for a single trial. Defendant's waiver was made on January 3, 2006. The rule governing permissive and mandatory joinder, MCR 6.120, was amended effective January 1, 2006, and provides in pertinent part:

**(B) Postcharging Permissive Joinder or Severance.** On its own initiative, the motion of a party, or the stipulation of all parties, except as provided in subrule (C), the court may join offenses charged in two or more informations or indictments against a single defendant, or sever offenses charged in a single information or indictment against a single defendant, when appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense.

(1) Joinder is appropriate if the offenses are related. For purposes of this rule, offenses are related if they are based on

- (a) the same conduct or transaction, or
- (b) a series of connected acts, or
- (c) a series of acts constituting parts of a single scheme or plan.

(2) Other relevant factors include the timeliness of the motion, the drain on the parties' resources, the potential for confusion or prejudice stemming from either the number of charges or the complexity or nature of the evidence, the

potential for harassment, the convenience of witnesses, and the parties' readiness for trial.

(3) If the court acts on its own initiative, it must provide the parties an opportunity to be heard.

**(C) Right of Severance; Unrelated Offenses.** On the defendant's motion, the court must sever for separate trials offenses that are not related as defined in subrule (B)(1).

Here, although defendant may have had the right to insist on separate trials if he could show that the robberies were not connected, MCR 6.120(C), defense counsel's statement indicates that the decision to have a joint trial was a matter of trial strategy. We will not second-guess trial strategy with the benefit of hindsight. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Defendant essentially argues that counsel's advice must have been flawed because counsel's decision allowed the prosecutor to argue in closing that the crimes were related, and that defendant became more wise and skilled in his techniques in each theft. However, defendant presents only the argument used by the prosecutor, and the results of the trial, to support his position. He has failed to disclose even a summary of counsel's actual advice to him, or how it was erroneous. We decline defendant's apparent request to engage in hindsight review of counsel's decision. *Id.* In addition, defense counsel's closing arguments suggest that he advised defendant to allow consolidation of the charges against him at least in part in order to take advantages of discrepancies in the victims' descriptions of the perpetrator, the handgun he allegedly used, and whether he acted alone or in conjunction with other people to create doubt as to the veracity of the testimony. That a strategy did not succeed does not render its use ineffective assistance. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

Since defendant has done nothing to rebut the strong presumption that defense counsel's actions constituted sound trial strategy, defendant has failed to establish that defense counsel's conduct fell below an objective standard of reasonableness *Toma, supra* at 302, and has not established that he was denied the effective assistance of counsel. *Id.* at 302-303.

Affirmed.

/s/ Mark J. Cavanagh  
/s/ Kathleen Jansen  
/s/ Stephen L. Borrello